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No. 08-340

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IN THE

Supreme Court of the United States

JANE DOE, INDIVIDUALLY AND AS NEXT FRIEND OF JULIE DOE, A MINOR,

Petitioner,

v.

MYSPACE, INC. AND NEWS CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS MYSPACE, INC. AND NEWS CORPORATION

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QUESTION PRESENTED

Whether the court of appeals correctly applied the immunity provision in Section 230(c)(1) of the Communications Decency Act, 47 U.S.C. § 230(c)(1), to Petitioner's allegations of harm resulting from the publication of user-generated content on MySpace's website.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents make the following disclosures:

MySpace, Inc. states that its parent corporation is News Corporation, a publicly traded company. No publicly traded entity owns more than 10 percent of News Corporation stock.

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INTRODUCTION

Petitioner seeks this Court's review of a decision of the Fifth Circuit that appropriately applied a well-established standard for immunity for interactive computer services under Section 230 of the Communications Decency Act ("CDA"). *See* 47 U.S.C. § 230(c)(1). As the Fifth Circuit summarized, "Courts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content." Pet. App. 8a. The Petition points to no actual conflicts in the courts of appeals, and the Fifth Circuit evinced no indication that it intended to deviate, or was potentially deviating, from the established standard. To the contrary, in the proceedings below, the court noted that Petitioner "appear[s] to agree with the consensus among courts regarding the liability provisions in § 230(c)(1)." *Id.* at 10a.

Like a Chicago Cubs' fan at the beginning of the season, Petitioner imagines that this time things are different, and that her claims against MySpace do not involve treating it as a publisher, despite numerous cases holding analogous website operators to be publishers within the meaning of § 230. The district court aptly labeled this "artful pleading" (Pet. App. 27a), and dismissed the effort to attempt to create fact-driven exceptions to § 230's clear statutory immunity (*id.* at 28a).

Petitioner's real complaint is with the policy decision made by Congress in enacting the broad immunity of § 230 to protect online service providers from liability for the content and consequences of third-party information communicated through their online service. This protection was specifically enacted to encourage the development of the Internet

as a free and open environment for the exchange of information and ideas. The appropriate forum in which Petitioner should lodge her complaint is Congress, not this Court. Certiorari should be denied.

STATEMENT OF THE CASE

Respondent MySpace, Inc. owns and operates MySpace.com, the world's largest social networking website. Respondent News Corporation is MySpace, Inc.'s ultimate parent company. Pet. App. 19a n.2. When Petitioner filed this lawsuit, MySpace.com had over 100 million users (*id.* at 43a) and was the most visited website in the United States (*id.* at 19a).

Online social networking is the practice of using a website or other interactive computer service to expand one's business or social network. Pet. App. 1a-2a. Social networking on MySpace.com begins with registration, during which a visitor to the site is required to provide to MySpace her name, age and e-mail address. Once registered, a MySpace.com member can create an online profile. *Id.* at 2a. A profile is an individual web page that serves as a medium for personal expression; a typical MySpace profile contains photographs, videos, and other information about the member that she chooses to share with other MySpace users. *Id.* As the court of appeals observed, "[m]embers have complete discretion regarding the amount and type of information that is included in a personal profile." *Id.*

The profile also serves as the vehicle through which the member can establish and expand her online social network. Once a member has created a profile, she can use it to extend "friend invitations" to existing friends who are MySpace members and to

communicate with them by linking to their online profiles, or by using e-mail, instant messaging, and blogs, all of which are hosted on the MySpace platform. Pet. App. 2a. Members can also add new friends to their MySpace "Friends List" in several ways. For instance, members can meet new friends online through MySpace user groups formed around common interests. *Id.* MySpace members can also become online "friends" with celebrities, artists, musicians and politicians who have created MySpace profiles to publicize themselves and to interface with supporters. *Id.*

Membership in MySpace.com is free to all who agree to the MySpace Terms of Use. Pet. App. 2a. These Terms of Use include measures designed to maintain a degree of civility on the site, and importantly, to enhance its safety. The MySpace Terms of Use expressly caution all members about the type of information they release to other users on the Web site and contain a specific prohibition against posting personal information such as telephone numbers, street addresses, last names, or e-mail addresses. *Id.* at 3a. MySpace members also are encouraged to report inaccurate, inappropriate, and obscene material to MySpace administrators. *Id.*

At the time the instant lawsuit was initiated, MySpace's Terms of Use required that members be 14 years of age or older. Pet. App. 2a-3a. To protect younger teens from being contacted by adult members whom they do not know, MySpace set the profiles of 14- and 15-year-old members to "private" by default. *Id.* at 3a. While MySpace has implemented sophisticated computer programs that are designed to search for clues that underage members have lied about their ages to join the site, the company also made clear that these programs are

not foolproof and that no website has developed technology to verify the age of all users reliably. *Id.* For example, the MySpace "Tips for Parents" explain that children should not lie about their age because doing so will circumvent MySpace's default safety features:

> Kids shouldn't lie about how old they are. MySpace members must be 14 years of age or older. We take extra precautions to protect our younger members and we are not able to do so if they do not identify themselves as such. MySpace will delete users whom we find to be younger than 14, or those misrepresenting their age.

Opposition App. 1a (emphasis omitted).[1]

It is undisputed that Julie Doe ignored MySpace's Terms of Use and created a MySpace profile when she was only 13 years old by misrepresenting herself to be 18 years old. Pet. App. 3a. Doe's decision to lie about her age enabled her to circumvent MySpace's safety features directed toward its younger teen members. *Id.* Not only did it allow her to create a MySpace profile when she was only 13, but also it made her profile public for all MySpace users to view. *Id.* Had Doe waited until she was 14 to create her member profile and honestly represented her age, the

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[1] Despite the potential for users to lie about their ages, Petitioner's allegation that children who have been "denied access to the site [for being underage may simply] reenter the same information with a false (and earlier) birth date" to obtain "full access to the website" is outside the record and false. *Cf.* Pet. 4. In order to prevent that very scenario, MySpace.com sends an "HTTP cookie" to the previously rejected applicant's computer, which prevents the rejected applicant from simply reapplying using a different age.

information in her profile would have been visible only to users on her "Friends List." *Id.*

Petitioner alleges that 19-year-old Pete Solis initiated contact with Julie Doe through MySpace.com in April 2006. Pet. App. 3a. At the time, Doe was 14 years old, but because she created her profile representing that she was 18, her profile was made public, and Solis was able readily to contact her online. *Id.* The two subsequently communicated offline on several occasions after Doe provided Solis with her telephone number. *Id.* They arranged to meet in person on May 12, 2006. Petitioner alleges that Solis sexually assaulted Doe during that meeting. *Id.* at 3a, 20a. Solis was subsequently arrested and indicted for sexual assault. *Id.* at 20a.

It is therefore undisputed that Doe and Solis met through their user-generated communications over MySpace.com, that Doe's violation of key provisions in the MySpace Terms of Use made those communications possible, and that MySpace's publication of Doe's profile was a necessary part of the causal chain leading to the alleged sexual assault. Petitioner and the district court succinctly summarized this factual background at the hearing on MySpace's motion to dismiss:

> THE COURT: I want to get this straight. You have a 13-year-old girl who lies, disobeys all of the instructions, later on disobeys the warning not to give personal information, obviously, [and] does not communicate with the parent. More important, the parent does not exercise the parental control over the minor. The minor gets sexually abused, and you want somebody else to pay for it? This is the lawsuit that you filed?

[Counsel for Petitioner]: Yes, your Honor.

Pet. App. 13a (first alteration in original).[2]

Petitioner first sued Solis and MySpace in state court in Travis County, Texas. Pet. App. 4a. Petitioner's Original Petition asserted claims for sexual assault and intentional infliction of emotional distress against Solis and claims for fraud, negligent misrepresentation, negligence, and gross negligence against MySpace. *Id.* MySpace filed special exceptions to Petitioner's Original Petition, asserting, among other things, that Petitioner's claims were barred by Texas common law and the CDA. *Id.* After Petitioner amended her Original Petition, MySpace filed a second set of special exceptions. *Id.*

In response, Petitioner nonsuited her claims in Texas and filed the present suit in New York Supreme Court in Bronx County, asserting the same

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[2] Petitioner's allegations about MySpace's knowledge of other alleged assaults of MySpace.com members are based on events that primarily occurred after Doe's alleged assault and are largely outside the record. Nine of the 14 specific incidents alleged in Petitioner's Complaint occurred after Doe allegedly met Solis online. Pet. 6 (citing Pet. App. 46a-49a). Furthermore, the allegation that MySpace discovered 29,000 sexual predators on its site (*id.*) is outside the record, and fails to mention that MySpace was the first company to commission the creation of the software that enabled it and other websites to identify sexual predators online, to proactively remove them from its website, and to provide their names to law enforcement. *See* Caroline McCarthy, *MySpace Responds to States' Request for Sex Offender Data*, cnet news, May 15, 2007, *at* http://news.cnet.com/8301-10784_3-9719654-7.html. This was one of the many industry-leading safety measures that MySpace instituted to protect its users, and one of the many measures that earned MySpace the commendation of 50 State Attorneys General. *See* http://www.mass.gov/Cago/docs/press/2008_01_14_myspace_agreement_attachment1.pdf.

claims against MySpace that she had asserted in Texas state court, but not naming Solis as a defendant. Pet. App. 4a. Doe apparently has not pursued her voluntarily dismissed claims against Solis.

The federal action began when MySpace removed the case to the Southern District of New York and simultaneously moved to dismiss pursuant to Rule 12(b)(6) and to transfer to the Western District of Texas pursuant to 28 U.S.C. § 1404(a). Pet. App. 4a. The New York district court granted MySpace's motion to transfer venue, but left the motion to dismiss to the transferee court in the Western District of Texas. *Id.*

On February 13, 2007, the Western District of Texas dismissed Petitioner's negligence and gross negligence claims with prejudice pursuant to section 230(c)(1) of the CDA, holding that Petitioner's claims sought to hold MySpace liable in its capacity as a publisher of third-party content. Pet. App. 27a-28a. The district court characterized as "disingenuous" Petitioner's argument that her claims were not directed towards MySpace in its capacity as a publisher, stating that "[i]t is quite obvious the underlying basis of Plaintiffs' claims is that, through postings on MySpace, Pete Solis and Julie Doe met and exchanged personal information which eventually led to an in-person meeting and the sexual assault of Julie Doe." *Id.* at 27a. The district court separately held that Petitioner's claims were barred under section 230(c)(2) of the CDA because Petitioner sought to hold MySpace liable for instituting allegedly ineffective security measures relating to age verification. *Id.* at 28a. In ruling on this alternative ground, the district court acknowledged that section 230(c)(2) immunity from liability for "'any action

voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be . . . harassing, or otherwise objectionable'" reflects "Congress's recognition that the potential for liability attendant to implementing safety features and policies created a disincentive for interactive computer services to implement any safety features or policies at all." *Id.*[3]

A unanimous panel of the United States Court of Appeals for the Fifth Circuit affirmed the district court's judgment on May 16, 2008 (Pet. App. 1a), holding that Petitioner's claims were barred by section 230(c)(1) of the CDA. The court of appeals held that Petitioner's claims that MySpace was negligent in allegedly failing "to implement measures that would have prevented Julie Doe from communicating with Solis" were "merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace's role as a publisher of online third-party-generated content." *Id.* at 12a.

The Fifth Circuit declined to consider the argument, which Petitioner raised for the first time on appeal, that MySpace was not immune under the CDA because it allegedly partially created the content at issue. In making this argument, Petitioner relied primarily on *Fair Housing Council* v. *Roommates.com, LLC*, 521 F.3d 1157 (9th Cir.

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[3] The district court also dismissed Petitioner's negligence and gross negligence claims on the independent basis that MySpace has no duty under Texas common law to protect Doe from Solis's criminal acts or to institute reasonable safety measures on its website. Pet. App. 29a-33a. Finally, the court dismissed Petitioner's fraud and negligent misrepresentation claims without prejudice, noting that Petitioner no longer wished to pursue those claims. *Id.* at 33a.

2008) (en banc) (involving a website that required completion of drop-down boxes that contained discriminatory pre-filled answers about personal characteristics of potential roommates). After reviewing the record, however, the Fifth Circuit held that Petitioner waived this argument by failing to present it to the district court. Pet. App. 16a. Petitioner does not appear to challenge that holding in this Court.

Having held that Petitioner's claims were barred under section 230(c)(1) of the CDA, the Fifth Circuit declined to consider the two independent, alternative bases for the district court's ruling—i.e., that Petitioner's claims were also barred under section 230(c)(2) of the CDA and that MySpace owed no duty of care to the Does under Texas common law. Pet. App. 17a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS ON THE SCOPE OF PROTECTION AFFORDED TO INTERACTIVE COMPUTER SERVICES UNDER SECTION 230(c)(1) OF THE COMMUNICATIONS DECENCY ACT.

Petitioner's principal argument for certiorari is an imagined conflict among the courts of appeals over the scope of the immunity afforded to interactive computer services from liability for all aspects of the publication of third-party content. Pet. 11. Petitioner concedes that the decision below is in accord with the decisions of numerous other courts on the question of the scope of § 230 immunity. *Id.*; *see also* Pet. App. 10a-11a. However, Petitioner claims that all of these cases conflict with the Seventh Circuit's decision in *Chicago Lawyers' Committee For*

Civil Rights Under Law, Inc. v. *Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008). But even this alleged outlier (which in truth is perfectly congruent with the consistent body of § 230 case law) also granted immunity to an interactive computer service based on claims arising from the publication of third-party content. Pet. 11.

All of the courts of appeals that have considered the issue have recognized that the plain language of § 230(c)(1) of the CDA provides broad protection to interactive computer services for all claims stemming from their publication of information supplied by third-party "information content provider[s]." *See* 47 U.S.C. § 230(c)(1). In language that is manifestly broad, § 230(c)(1) specifically states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id.* Under the CDA, "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.* § 230(e)(3). No narrowing of that requirement would be faithful to its text.

Petitioner struggles to manufacture a conflict among court decisions interpreting this statutory language, but in fact courts have been overwhelmingly consistent in their construction of the scope of immunity for interactive computer services under § 230. Courts uniformly have held that any claim seeking to impose liability on an interactive computer service for harm resulting from information provided by a third party necessarily treats that interactive computer service as a publisher of that information within the meaning of § 230(c)(1) of the CDA, and therefore is barred.

1. The first appellate court to consider the scope of immunity under § 230(c)(1) was the Fourth Circuit in *Zeran* v. *America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). In *Zeran*, an unidentified individual advertised merchandise featuring offensive slogans related to the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, with instructions to contact Zeran at his home telephone number for further information. *Id.* at 329. Zeran brought a negligence action against AOL based on AOL's delay in removing the messages, refusal to post a retraction and failure to screen for similar messages. *Id.* at 328.

The Fourth Circuit affirmed the district court's judgment in favor of America Online based on § 230 immunity. The Fourth Circuit observed that "[b]y its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Id.* at 330. The congressional purpose in enacting such a broad immunity provision for interactive computer services was readily apparent to that court:

> Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.

Id. Thus, the court rejected Zeran's attempt to hold AOL responsible for allowing the contents of the third party messages to be communicated through its

website, as "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred." *Id.*

Numerous other federal and state courts have followed the Fourth Circuit's lead in *Zeran* and have recognized § 230(c)(1)'s broad protection for interactive computer services in the exercise of all aspects of their traditional "publisher" functions. *See Fair Housing Council* v. *Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc); *Chicago Lawyers' Committee For Civil Rights Under Law, Inc.* v. *Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008); *Universal Commc'n Sys., Inc.* v. *Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007); *Carafano* v. *Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003); *Batzel* v. *Smith*, 333 F.3d 1018 (9th Cir. 2003); *Green* v. *America Online*, 318 F.3d 465 (3d Cir. 2003); *Ben Ezra, Weinstein, & Co.* v. *America Online Inc.*, 206 F.3d 980, 985-86 (10th Cir. 2000); *Barrett* v. *Rosenthal*, 146 P.3d 510 (Cal. 2006); *Doe* v. *America Online, Inc.*, 783 So.2d 1010 (Fla. 2001).

As each of these courts recognized, § 230(c)(1) bars a claim if (1) the defendant is a provider of an interactive computer service; (2) the claim is based on information provided by another information content provider; and (3) the claim would treat the interactive computer service as the publisher of that information. *See, e.g.*, *Lycos*, 478 F.3d at 418. For example, in *Ben Ezra*, 206 F.3d at 985-86, the Tenth Circuit relied on § 230(c)(1) in rejecting a suit against AOL for publishing incorrect information provided by a third party concerning Plaintiff's stock price and share volume, even where AOL was found to have engaged in some editorial functions with respect to the stock

data. Similarly, in *Carafano*, 339 F.3d at 1125, the Ninth Circuit invoked § 230(c)(1) in affirming the dismissal of claims against a website that failed to prevent the posting of a false personal advertisement about actress Christine Carafano that resulted in harassing and threatening messages to her. And, in *Lycos*, 478 F.3d at 420, the First Circuit likewise found that § 230(c)(1) immunized interactive computer services that operated message boards from liability for the user-generated content on those message boards.

Petitioner mischaracterizes § 230 as limited to those claims of harm resulting from the "content of a particular publication." Pet. 14. This narrow reading of the language of § 230 has no support in the text of the statute or in the long line of cases interpreting it. To the contrary, courts have been overwhelmingly consistent and clear in applying § 230 immunity in cases where the alleged harm resulted from any action taken by an interactive computer service in its capacity as "publisher" of information provided by another information content provider—including not only harms allegedly resulting from the content of the third-party information, but also harms resulting from access to and communication of that information. That is, under § 230, there is no liability where the alleged harm stems from the interactive computer service's "decisions relating to the monitoring, screening, and deletion of content from its network—actions quintessentially related to a publisher's role." *Green*, 318 F.3d at 471; *see also Ben Ezra*, 206 F.3d at 986 ("Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions."); *Carafano*, 339 F.3d at 1123 ("§ 230(c) provides broad immunity for

publishing content provided primarily by third parties").

Courts have applied § 230(c)(1) to immunize interactive computer services from claims of harm resulting from actions taken in their capacity as "publisher" of third-party content even where, as here, the plaintiff attempted to frame her claim in such a way as to avoid the reach of § 230. In *Green*, for example, the Third Circuit declined to hold AOL liable to an individual using the service who received a computer virus and was subject to derogatory postings about him in an AOL chat room. *Green*, 318 F.3d at 473. Similar to Doe in this case, Green sued AOL, claiming that the interactive computer service failed to take measures sufficient to protect him from such user-generated information. *Id.* at 469. The Third Circuit rejected Green's attempt to plead around § 230, finding "no real dispute" that Green was seeking to hold AOL liable for "decisions relating to the monitoring, screening, and deletion of content from its network—actions quintessentially related to a publisher's role." *Id.* at 471. As the Third Circuit recognized, "Section 230 'specifically proscribes liability' in such circumstances." *Id.* (quoting *Zeran*, 129 F.3d at 332-33).

2. Contrary to Petitioner's suggestion (Pet. 20), the Seventh Circuit's decision in *Craigslist* is consistent with the court of appeals below and all of the other courts of appeals that have interpreted the immunity provision of § 230. In *Craigslist*, Plaintiffs sought to hold the online service liable for advertisements posted on the craigslist.com website that allegedly violated the Fair Housing Act. *See Craigslist*, 519 F.3d at 668. The Seventh Circuit applied § 230 to the activities of Craigslist in publishing advertisements of its users that allegedly

violated federal housing laws, noting (as other courts of appeals have) the difficulties inherent in making online services liable for the import or implications of third-party postings. *Id.* at 668-69. Thus, the court held that under § 230(c)(1), Craigslist cannot be subject to suit for any unlawful content in the third party's postings. *Id.* at 672.

Despite the court's recognition of immunity, Petitioner claims a conflict between the Seventh Circuit's decision in *Craigslist* and the decision in the instant case because certain dicta in *Craigslist* suggested that the Seventh Circuit's holding was limited to the case before it and, according to Petitioner, "recognize[d] that § 230(c)(1) provides, at most, a limited immunity, from claims that bear no resemblance to Doe's." Pet. 11. It is hardly controversial, based on the plain language of the statute, that the Seventh Circuit stated, in dicta, that "§ 230(c) as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts." *Craigslist*, 519 F.3d at 669.[4]

Just as clearly, this statement does not conflict with the holding of the Fifth Circuit nor any of the other cases interpreting the scope of § 230. The court below certainly did not purport to apply a "general prohibition of civil liability" to MySpace; rather, it held merely that where a claim is directed at MySpace acting in its "'publishing, editorial, and/or screening capacities,'" that claim is barred by § 230(c)(1). Pet. App. 11a. This result is consistent

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[4] Indeed, the text of the statute restricts the protection afforded to interactive computer services in cases involving intellectual property infringements and criminal law violations. *See* 47 U.S.C. § 230(e)(1), (2).

with the holding in *Craigslist* immunizing the website for harms resulting from the posting of content by third parties. *See Craigslist*, 519 F.3d at 672.

The Ninth Circuit, in an en banc opinion issued after the Seventh Circuit's decision in *Craigslist*, confirms that the scope of § 230 immunity for interactive computer services extends to all aspects of the publication of user-generated content. *Roommates.com*, 521 F.3d at 1174-75. Similar to *Craigslist*, *Roommates.com* involved allegations that the website should be liable for posting user-generated advertisements that violated provisions of the Fair Housing Act. While the Ninth Circuit did not extend § 230 immunity to content that the website itself allegedly created by mandating illegal responses from its users (*id.* at 1164), *Roommates.com* affirmed the settled understanding in § 230 jurisprudence that "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230." *Id.* at 1170-71. Significantly, the Ninth Circuit itself noted that its decision was fully in line with prior judicial interpretations of the CDA's immunity provisions. *Id.* at 1172 n.33.[5]

3. The court of appeals' decision in this case is nothing more than an application of the consistent interpretation of the same test for § 230 immunity as applied by the other courts. Doe's lawsuit against

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[5] Doe argued for the first time before the Fifth Circuit that MySpace should be liable as an "'information content provider.'" Pet. App. 12a. After noting that there was no support for that claim (*id.* at 12a-16a), the Fifth Circuit held that Doe was barred from presenting the argument for the first time on appeal. *Id.* at 16a.

MySpace seeks to hold the interactive computer service responsible for allowing the publication of Julie Doe's profile, and not blocking the subsequent communications between Doe and Solis that ultimately led to the personal encounter and the sexual assault of Julie Doe.

Following the decisions in *Carafano*, *Zeran*, and *Green*, among others, the court of appeals recognized that "[c]ourts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content." Pet. App. 8a. The court noted that Doe did not appear to disagree with the consensus interpretation of § 230 immunity. *Id.* at 10a. Rather, she argued that she was not suing MySpace in its capacity as publisher, but instead based her claims on MySpace's alleged failure to implement safety measures to protect Julie Doe. *Id.*

Much like the courts in *Zeran* and *Green*, however, the Fifth Circuit rejected Doe's attempt at "artful pleading" to avoid application of the immunity provision of § 230 to MySpace. The court of appeals affirmed the district court's rejection of Doe's description of her claims as "disingenuous," where it was "quite obvious" that Doe sought to hold MySpace liable for the exercise of its traditional publisher roles—deciding whether to publish Julie Doe's profile and establishing rules for access to and communicating with that profile. Pet. App. 10a. Noting that other courts have rejected other plaintiffs' similar attempts to plead around § 230 by fashioning their claims as "failure to protect" arguments (Pet. App. 11a-12a (citing *Green*, 318 F.3d at 471; *Zeran*, 129 F.3d at 333)), the Fifth Circuit affirmed the findings of the district court that Doe's true complaint against MySpace was for its

publication of the underlying postings by Julie Doe and Solis, without which there would have been no harm to Julie Doe. *Id.* at 10a-11a. The court held that Doe's attempt to plead her case as concerns about MySpace's allegedly lax security measures is simply another way of alleging that MySpace was negligent or otherwise deficient in its traditional publisher role. As such, Doe's claims are barred under § 230(c)(1).

Furthermore, although the Fifth Circuit did not reach the issue (*see* Pet. App. 17a), Doe's claims against MySpace also fail under § 230(c)(2) of the CDA. *See* 47 U.S.C. § 230(c)(2). That provision affords immunity to interactive computer services for actions taken in good faith to screen objectionable content from their sites.[6] As the district court recognized, to the extent Doe seeks to hold MySpace liable for implementing security measures that failed to prevent Julie Doe from lying about her age and thereby receiving communications from Solis, such claim would be barred by § 230(c)(2). Pet. App. 28a.[7]

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[6] The purpose of § 230(c)(2) was to eliminate any deterrents that might exist for interactive computer services if they faced liability for attempting to screen or otherwise police their sites for objectionable content. *See Zeran*, 129 F.3d at 331 (noting the policy objective of "'remov[ing] disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material'") (quoting 47 U.S.C. § 230(b)(4)).

[7] The district court also found that MySpace had no duty under Texas state law to protect Julie Doe from Solis's criminal acts or to institute reasonable safety measures on its website. Pet. App. 32a.

II. THE FIFTH CIRCUIT'S DECISION REFLECTS THE PROPER BALANCE OF CONGRESSIONAL OBJECTIVES IN ENACTING § 230.

Section 230 of the CDA represents Congress' considered judgment that it would be better for the "unfettered and unregulated development of free speech on the Internet" if courts were not left to second-guess whether the operator of an interactive computer service should have deleted or never posted specific information generated by third-parties. *Batzel*, 333 F.3d at 1027. Petitioner presents the policy behind § 230 as merely to "encourag[e] providers of interactive computer services to take steps to protect users, and especially children, from being harmed by other users of their services." Pet. 1. While partially true, this reading ignores the plain language of the statute, which sets out the policy underlying § 230 and the immunity provided in § 230(c)(1): to protect and promote a vibrant Internet where torrents of user-generated information, or even misinformation, can flow unobstructed by government interference.[8]

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[8] Petitioner is correct in her assertion that the Seventh Circuit in *Craigslist* recognized that one of the purposes of § 230 was "to protect providers of interactive computer service from being held liable for having made some attempt to protect its users from third-party tortious conduct." Pet. 20. That was Congress' express purpose in adopting § 230(c)(2)—to eliminate any incentive for interactive computer services to abstain from engaging in monitoring and other protective measures due to a fear of being found insufficient once an attempt was made. Indeed, this portion of the Seventh Circuit's decision in *Craigslist* is entirely consistent with the prior cases on § 230, which recognized distinct congressional intent in enacting § 230(c)(1) and § 230(c)(2). *See, e.g.*, *Zeran*, 129 F.3d at 331 ("Another important purpose of § 230 was to encourage service

In the enacted preamble to § 230, Congress sets out findings regarding the importance of interactive computer services to Americans' "educational and informational resources", "diversity of political discourse", "cultural development", and "intellectual activity." 47 U.S.C. § 230(a). These findings also note the user control inherent in these services, and the success of these forums with minimum governmental regulation. *Id.* Congress then explicitly sets out the policy behind § 230, including "to promote the continued development of the Internet and other interactive computer services and other interactive media," and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." *Id.* § 230(b)(1), (2). Congress thus was quite clear that its intention in creating the immunity provisions of § 230 was to foster interactive computer services' role as a forum for the free and prolific exchange of ideas, communication and commerce.

The immunity provisions in § 230(c)(1) represent Congress' decision to encourage the expansion of online services that can exist in the limitless, decentralized capabilities of the Internet. Congress recognized that no website reasonably could be expected to monitor the staggering amount of user-generated content published online, and made the policy choice in enacting § 230(c)(1) to promote the continued growth of the Internet by ensuring that these websites would be immune from liability for

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providers to self-regulate the dissemination of offensive material over their services."); *Batzel*, 333 F.3d at 1028 (recognizing the dual legislative purposes in enacting §230).

certain actions stemming from user-generated content on the site.[9]

The decisions interpreting § 230(c)(1) have respected this policy choice. In *Zeran*, for example, the Fourth Circuit noted that "Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." *Zeran*, 129 F.3d at 330; *see also Batzel*, 333 F.3d at 1027 (explaining that Congress sought to "encourage the unfettered and unregulated development of free speech on the Internet."); *Roommates.com*, 521 F.3d at 1175 ("[T]he intent of Congress [was] to preserve the free-flowing nature of Internet speech and commerce without unduly prejudicing the enforcement of other important state and federal laws."). The Ninth Circuit also elaborated on the reasoning behind § 230 in *Carafano*:

> "The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the

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[9] *See* 141 Cong. Rec. 22,044, 22,046 (1995) (Rep. Goodlatte) ("There is no way that any of those [interactive computer services] can take the responsibility to edit out information that is going to be coming in to them from all manner of sources on their bulletin board. We are talking about something that is far larger than our daily newspaper. We are talking about something that is going to be thousands of pages of information every day, and to have that imposition imposed on them is wrong.").

> number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect."

Carafano, 339 F.3d at 1124 (quoting *Zeran*, 129 F.3d at 330-31).[10]

Furthermore, the immunity provisions of § 230(c)(1), as interpreted by the courts of appeals, do not leave those harmed in the course of online communications without recourse. The actual tortfeasor, the originator of the content, is still liable. As in this case, those injured by communications in an online forum can pursue their claims directly, and law enforcement can directly prosecute for criminal acts. *See Zeran*, 129 F.3d at 330.

* * * *

This Petition challenges a clear statutory immunity that the courts of appeals have applied in a consistent manner. Courts have recognized the plain application of this immunity even in the face of

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[10] Congress also has endorsed the judiciary's broad and practical interpretation of the immunity provisions in § 230(c)(1) in subsequent legislation. In a report accompanying the "Dot Kids Act" in 2002, the House Committee stated:

> The Committee notes that ISPs have successfully defended many lawsuits under section 230(c). The courts have correctly interpreted section 230(c), which was aimed at protecting against liability for such claims as negligence (*See, e.g., Doe* v. *America Online*, 783 So.2d 1010 (Fla. 2001)) and defamation (*Ben Ezra, Weinstein, and Co.* v. *America Online*, 206 F.3d 980 (10th Cir. 2000); *Zeran* v. *America Online*, 129 F.3d 327 (1997)). The Committee intends these interpretations of section 230(c) to be equally applicable to those entities covered by [this new legislation].

H.R. Rep. No. 107-449, at 13 (2002), *reprinted in* 2002 U.S.C.C.A.N. 1741, 1749.

creative pleadings that attempt to contrive the basis of their claims. And Congress' grant of this immunity for the express purpose of fostering industry self-regulation while preserving Internet forums as places for free and prolific exchange of ideas has worked. We respectfully urge this Court to decline to ignore the plain language of the statute, the consensus of the courts of appeals, and the unmistakable vision for the Internet that Congress sought to foster.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 16, 2008

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APPENDIX

APPENDIX

myspace.com
a place for friends

TIPS FOR PARENTS

For teens, MySpace is a popular online hangout because the site makes it easy for them to express themselves and keep in touch with their friends.

As a parent, please consider the following guidelines to help your children make safe decisions about using online communities.

- *Talk to your kids about why they use MySpace, how they communicate with others and how they represent themselves on MySpace.*
- *Kids shouldn't lie about how old they are. MySpace members must be 14 years of age or older.* We take extra precautions to protect our younger members and we are not able to do so if they do not identify themselves as such. MySpace will delete users whom we find to be younger than 14, or those misrepresenting their age.
- *MySpace is a public space.* Members shouldn't post anything they wouldn't want the world to know (e.g., phone number, address, IM screen name, or specific whereabouts). Tell your children they should avoid posting anything that would make it easy for a stranger to find them, such as their local hangouts.
- *Remind them not to post anything that could embarrass them later or expose them to danger.* Although MySpace is public, teens

sometimes think that adults can't see what they post. Tell them that they shouldn't post photos or info they wouldn't want adults to see.

- *People aren't always who they say they are. Ask your children to be careful about adding strangers to their friends list.* It's fun to connect with new MySpace friends from all over the world, but members should be cautious when communicating with people they don't know. They should talk to you if they want to meet an online friend in person, and if you think it's safe, any meeting should take place in public and with friends or a trusted adult present.
- *Harassment, hate speech and inappropriate content should be reported.* If your kids encounter inappropriate behavior, let them know that they can let you know, or they should report it to MySpace or the authorities.
- *Don't get hooked by a phishing scam.* Phishing is a method used by fraudsters to try to get your personal information, such as your username and password, by pretending to be a site you trust. *Click here* to learn more.

Click Here to remove your *child's profile* from MySpace

For more information on Monitoring software, please visit:

- *Software4parents.com*
- *k9webprotection.com*

To learn more please visit these other resources:

- *OnGuard Online*: FTC safety tips for parents
- *Netsmartz.org*
- *WiredSafety.org*
- *The Child Safety Network*
- *GetNetWise.org*
- *SafeTeens.com*
- *BlogSafety.Com*
- *Common Sense Media*

You can also check out the new book by Larry Magid and Anne Collier:

MySpace Unraveled: What It Is and How to Use It Safely

[May 2006]